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ABSTRACT

Decreasing competition between daily newspapers led the United States Congress to pass the Newspaper Preservation Act (NPA) of 1970, providing limited exemption from antitrust laws for newspapers working under joint operating agreements. The bill was passed after the Justice Department successfully brought suit against two Arizona newspapers that had combined advertising, circulation, production, and business departments. Newspapers in 21 other cities were operating under similar agreements, and Congress felt that splitting up other agreements would cause some of the newspapers to fail. Many who are not alarmed at decreasing competition among newspapers have questioned whether newspapers deserve the special exemption, but the NPA has withstood a Constitutional test and has become more defined through judicial interpretation. The Justice Department now must closely scrutinize newspapers applying for exemption under the NPA so that new joint operating agreements do not drive out or prevent the entrance of other newspapers in the marketplace. The effectiveness of the NPA has yet to be determined since only a few papers have applied and since a significant lawsuit involving two California papers has yet to be completed. Used properly, however, the NPA can successfully protect needed newspapers from extinction. (Author/HTH)

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The Newspaper Preservation Act: Is It a Necessary Loophole in Antitrust Laws?

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The Newspaper Preservation Act:

Is It a Necessary Loophole in Antitrust Laws?

Decreasing competition between daily newspapers has caused great concern in the minds of those who have cherished the role of the press in creating a marketplace of ideas. Independent newspapers facing economic distress have been forced either to jump on the bandwagon of chain ownership, combine their business functions in what are called "joint operating agreements," or both. These joint operating agreements went against the grain of antitrust legislation until 1970, when Congress passed a bill to protect newspapers working under such agreements and to save newspapers requiring such agreements to stay in business. The act, called the Newspaper Preservation Act (NPA), was surrounded by much controversy, and its effectiveness has yet to be decided.

A newspaper, like any other business, is subject to antitrust laws. Section Two of the Sherman Act, Section Seven of the Clayton Act and Section Five of the Federal Trade Commission Act form the basis of antitrust law involving media.[1] Under Section Two of the Sherman Act, monopolies are permissible so long as they don't seek to control the market price of a product or act to exclude competitors. They can exist only because of superior skill, superior products, natural advantages, economic or technological efficiency.[2] The Clayton Act seeks to avoid mergers which allow parties to maximize profits without the interplay of effective competition.[3] Also, the FTC Act of 1976 covers "unfair practices" in conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.[4] These acts (not the FTC Act, which was not passed until 1976), when they were applied to a pair of Tucson, Arizona newspapers working under a joint operating agreement, sent fear into the newspapers of 21 other cities where similar operating agreements were used.[5]

The Newspaper Preservation Act of 1970 was born out of a Supreme Court decision ordering divestiture of two Tucson newspapers, the Tucson Daily Citizen and the Arizona Daily Star. On July 1, 1940, Citizen Publishing Company, publishers of the Citizen, and Star Publishing Company, publishers of the Star, entered into a joint operating agreement.[6] Together they formed Tucson Newspapers, Inc., with the purpose of ending business or commercial competition between themselves.[7] This was accomplished by price fixing -- the uniform sales, advertising rates and distribution of the two newspapers, and profit pooling -- splitting profits at an agreed ratio.[8] After the stockholders of Citizen Publishing Company bought the stock held by Star Publishing Company in 1965, the United States Justice Department stepped in and filed suit claiming the move was an anticompetitive merger in violation of the Clayton Act and that the price fixing, profit pooling and market allocations of the joint operating agreement were a conspiracy to suppress competiton under the Sherman Act.[9] The case progressed to the Supreme Court, where divestiture was ordered. A problem developed, however, in that the Sherman Act allows a defense for "failing companies," and though all the justices agreed that neither of the Tucson newspapers were failing, there was great disagreement involving the definition of a failing newspaper.[10]

Within two days of the Supreme Court's ruling, eight bills were introduced into Congress to save the joint operating agreements between newspapers in the 21 other cities from action by the Justice Department. It was argued by publishers and members of Congress that if the Tucson decision was allowed to stand, losses incurred in the removal of economic benefits might force some of the newspapers out of business.[11] Thus, the NPA was signed into law in 1970 "in the public interest of maintaining a newspaper press editorially and reportorially independent and competitive."[12] The Act upheld the joint operating agreements in the 22 cities including Tucson and called for the approval

of the United States Attorney General before the formation of future agreements where antitrust exemption was desired (as interpreted in Newspaper Guild v. Levi).[13] It said that one, but not more than one, of the newspapers entering into an agreement must be other than in danger of failing. There can be no combination of editorial staffs, and editorial policies must be independently determined.[14]

The bill, however, was not passed without controversy and was not without need of judicial interpretation. In Newspaper Guild v. Levi, Circuit Judge Tann said:

> In passing the Newspaper Preservation Act, Congress attempted to balance the competing interests of what it perceived as a threatened newspaper industry against the dangers of anticompetitive practices. The highly controversial bill, opposed by national unions and organizations of suburban newspapers, was amended numerous times to allay the fears of its opponents that a few newspapers would be benefitted at the expense of the entire industry.[15]

The controversy Tann mentioned came to the surface in the 1972 case of Bay Guardian Company v. Chronicle Publishing Co.[16]

The San Francisco Bay Guardian, a monthly newspaper, challenged the the constitutionality of the NPA which allowed San Francisco's Chronicle and Examiner to continue their joint operating agreement which was begun in 1956.[17] The Bay Guardian claimed that the agreement allowed a journalistic monopoly, but Chief District Judge Carter disagreed, saying:

> The simple answer to the plaintiffs' contention is that the Act does not authorize any conduct. It is a narrow exception to the antitrust laws for newspapers in danger of failing. Thus it is in many respects merely a codification of the judicially created "failing company" doctrine.
>
> Here the Act was designed to preserve independent editorial voices. Regardless of the economic or social wisdom of such a course, it does not violate the freedom of the press. Rather it is merely a selective repeal of the antitrust laws. It merely looses the same shady market forces which existed before the passage of the Sherman, Clayton and other antitrust laws.[18]

Though Carter upheld the NPA's constitutionality, his word choice doesn't seem to voice approval of the NPA, or at least the situation in San Francisco.

It is doubtful whether the Chronicle or the Examiner could have met the failing newspaper standard of the NPA, because that issue was settled out of court with a number of parties including the Bay Guardian receiving a total of $1,350,000.[19]

In another case, Honolulu v. Hawaii Newspaper Agency (1979),[20] Judge Curtis cited two areas where the NPA failed to set forth interpretations explicitly, which he attributed to the way the act was hurriedly prepared and passed to extend immunity to newspaper combinations then under attack.[21] Curtis examined Congressional committee reports and discussions and made the distinction that the joint operating agreements in the 22 cities created prior to the passage of the NPA were merely saved from the effects of the ruling in the Tucson case and therefore were not exempt from scrutiny under the "failing newspaper" criteria of the NPA. The other problem he discussed was the absence of a statute of limitations, which he called "a serious oversight on the part of Congress and will no doubt cause much mischief in the years to come if it is not corrected."[22] This "mischief" could indeed occur, as private organizations may at any time file suit against newspapers jointly operating where neither is a failing newspaper. In fact, the San Francisco Examiner and the San Francisco Chronicle have again been sued, this time by two weekly newspapers in the Bay area, the Pacific Sun and the Berkeley Barb, plus four employment agencies. The plaintiffs claim that the joint operating agreement between the Examiner and the Chronicle drove advertising rates up to monopolistic levels.[23] The case rests on whether the Examiner would have failed without the joint operating agreement. However, the jurors' inability to decide this issue led to the declaration of a mistrial on January 7, 1980.[24] According to the Sun's assistant publisher, it is possible that if the weekly newspapers eventually win the case, similar joint operating agreements which

inhibit the market operations of weeklies, not just dailies, may be in jeopardy.[25] This could be significant, with the tremendous increase in the number of weekly newspapers published since 1970.[26]

In dealing with the problems of balancing freedom of the press with market competition, the Justice Department has had to keep a careful eye on media developments regarding concentration of media sources and media ownership. This is done in the following ways:

> 1) by closely scrutinizing mergers and joint operating agreements among competing newspapers in the same market. 2) by vigorously supporting both a prospective and retroactive prohibition on the cross-ownership of a daily newspaper and broadcast properties within the same market, and 3) by monitoring actions of dominant daily newspapers that may threaten existing competition or serve to erect barriers to entry.[27]

The need for newspapers to pursue outlets like chain ownership and joint operating agreements, which the Justice Department must scrutinize, has come largely from the economic burdens resulting from rising costs and fierce competition for circulation and advertising. According to John Shenefield, former assistant attorney general in charge of the Antitrust Division of the Justice Department:

> In some instances, this decline (the reduction of cities with commercially competitive newspapers, from 180 in 1940, to 35 now) can be attributed to the higher average costs imposed on a smaller paper as a result of the many large advertisers to place a disproportionately large portion of their advertising dollars with the newspaper having the larger circulation. In addition, the decline may be in part a result of increased competition from the broadcasting media and from weekly or free-distribution newspapers, the latter being particularly a phenomenon of suburban areas.[28]

Two Cincinnati newspapers, the Enquirer and the Post, elaborated on these economic arguments in their application to the Attorney General for approval of a joint operating agreement. They cited rising costs in raw materials, mainly newsprint, along with other operating expenses, as causing newspapers to rely more heavily on advertisers than subscribers to cover the costs of

production.[29] Since trends in micro-economic variables and macro-economic variables greatly affect the interdependence of circulation and advertising, and since these trends, once established, are rarely reversed, this interdependence is likely to speed the demise of a newspaper operating at a cost disadvantage.[30] Opponents of the NPA, though they may acknowledge these economic factors, don't believe newspapers should be treated differently from other businesses.[31] They believe that newspapers should not be allowed to make profits by violating antitrust laws, which allows a newspaper to move from its failing economic situation to one which can use monopolistic measures to reap profits. This is what the San Francisco Examiner and Chronicle are accused of doing.[32] Apart from economic arguments against the NPA, there is no proof that loss of competition between newspapers is harmful to creating a marketplace of ideas.

Through historically newspaper competition has been considered desirable, the argument of NPA opponents is that the effect of newspaper competition enhancing the media's role in society is merely an assumption without researched proof. The development of other media sources and the technological advances that allow them to penetrate virtually every home in the United States have led some to believe that the so-called media concentration and newspaper decline epidemic is merely a myth.[33] Derick Daniels, executive editor of the Detroit Free Press wrote:

> The mix and multiplicity of general, suburban and specialized newspapers; general, local and educational television; general and specialty magazines, radio, movies and the paperback industry will overload, many thousands of times, the available minutes which any individual has available.[34]

And James Reston of the New York Times wrote:

> Out of this vast network of stations and newspapers now pours out night and day the greatest flow of information and and the loudest clash of divergent opinion ever inflicted on

> a long-suffering people in the history of the written and spoken word.[35]

These arguments suggest that preservation of newspaper competition is no longer essential. But even if it is conceeded that it is generally desirable to preserve separate media voices, the NPA has not been shown to do this. A study comparing the quantity of space given to regular news stories between newspapers under joint operating agreements in 1964 resulted in "a negative responseto the question of whether joint printing newspapers maintain two different news voices in a community."[36] The study, however, did not examine editorial coverage. Also, two Indiana University faculty members did a study of Bloomington, Indiana, readers before and after the Courier-Tribune folded in 1973, leaving only the Herald-Telephone. They examined the critics fears that monopoly, including limited monopoly, reduced both the quality and diversity of information and opinion available to the public and concluded:

> . . . these results suggest that for the intended audience the presence or absence of daily newspaper competition does not seem to make much difference. So the question of whether the public is better served by competing newspapers or by monopoly papers remains an academic one. When there is competition between newspapers neither the public nor the news-editorial departments of the newspapers seem to behave as if there were competition.[37]

However, the role the press has taken throughout history and the prospects for more efficient production of newspapers in the future offers support for the preservation of competition.

The critics who fear declining newspaper voices and favor preserving newspapers seem to do so not because of what will happen if newspapers are lost, but by what the public gains if they are preserved. Shenefield said:

> The media plays a critical role as the transmission mechanisms of political and artistic ideas from their creators to the public, as the sounding board of our political system, if you will. It is, therefore, appropriate to use the antitrust laws to promote the maintenence of numerous media "voices," even when the number of firms in a given market might be considered adequate to ensure competition in other business contexts.[38]

He added that there is reason to hope that new, more efficient printing technology will ease the economies of scale problem, and in the long run lead to a rebirth of competing daily newspapers.[39] Herbert Klein, former President Nixon's communications director, and now editor-in-chief of the Copley chain of daily and weekly newspapers said this in his book about the importance of newspapers:

> The American press has become so important to what happens in the world that it has become an equal with the three branches of government. It so affects the way people perceive events,[40]

It seems, therefore, in light of the newspaper's potential role in society, the press deserve the benefit of the doubt, or the benefit of protection under the NPA. The true test lies in how applications for new joint operating agreements are handled by the Justice Department.

Since the NPA was passed in 1970, only three applications for antitrust relief have been filed. Two of these were granted and one had yet to be decided. The first was approved in 1974 between two Anchorage, Alaska newspapers, though the relationship has since been terminated. It took the Attorney General (first Griffin Bell, then Benjamin Civiletti) two years to decide in the second case involving the Cincinnati Post and the Cincinnati Enquirer. Even after Civiletti approved the pact, the merger was further delayed by an appeal filed by Post pressmen who protested that the Post had not been offered for sale. The pressmen's claim that the Post could have tried harder to keep business operations separate was denied, and roughly 530 pressmen lost their jobs.[41] In the third case, the pending decision on the application for joint operations between the Chattanooga Times and the News Free-Press may, along with the pending decision in the San Francisco newspapers trial, set an important precedent in application of the NPA. The

Times, a "Democratic, liberal, intellectual" newspaper and the News Free-Press, a "Republican, conservative, unabashed hometown booster" fought a "bloody" circulation battle in the 60's.[42] The News Free-Press won, as it was conceded by all that it knew the readers' tastes better and hustled much harder to win their loyalty.[43] The Times had also been accused of being poorly managed, with the final result being a big loss in circulation and advertising, multiplying the paper's financial losses.[44] Because of these losses, which have been incurred through the 70's to the present, the Times applied for temporary relief earlier this year (allowing joint operation to begin before the decision is reached, when a newspaper might fail before the application and its arguments can be fully studied)[45] but the application was denied because of insufficient evidence.[46] It has been questioned whether the Times has taken enough alternative measures to curb its financial losses,[47] and perhaps the Times believes that the faster it falls, the better chance it has of receiving approval for the merger.[48] If the accusations are true and the Attorney General approves, the NPA would not be serving the public good but rather serving the business interests of the Times and the News Free-Press, both of which will reap profits from the deal.[49]

It is hard to critique the Justice Department's actions until controversial decisions in the Chattanooga and San Francisco cases are made (the "failing newspaper"qualification to be decided in San Francisco was never decided in Bay Guardian v. Chronicle Publishing Co). But if joint operating agreements under the NPA can allow two newspapers to become very profitable, as it seems they can,[50] the Justice Department should pursue its goal to watch closely the NPA's provision condemning "any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating agreement which would be unlawful under any antitrust law if engaged in by a single entity."[51] Though newspaper preservation is important, it should not restrict the development of other press

forms through illegal, predatory actions. These actions do not serve the goals of the First Amendment.

Update

The partial approval for the proposed joint operating agreement in Chattanooga by Attorney General Benjamin Civiletti and a Federal District Court jury decision favoring two San Francisco dailies have further defined the criteria for receiving protection under the Newspaper Preservation Act of 1970.

The controversy surrounding the joint operating agreement application by the Chattanooga Times and the News Free-Press deepened in May, 1980, when the newspapers combined printing facilities, the News Free-Press shifted its Saturday edition to the afternoon, and the Times discontinued its Sunday edition.

Because the newspapers made the moves without attorney general approval, Civiletti's November, 1980 approval of the pact did not include an exemption from antitrust laws in these three areas of the agreement.

The rest of the pact, which covered the combining of advertising, circulation, and business departments, received the exemption.

Partial approval of the pact was necessary, according to Civiletti, in order to keep a second independent editorial voice in Chattanooga.[52] The decision to give only partial approval is the first time an attorney general has refused to grant part of any application made under the NPA.

In the second trial of a suit which began in January, 1980, a jury ruled on June 15 that the San Francisco Examiner has satisfied the failing newspaper requirements of the NPA when it entered into a joint operating agreement with the San Francisco Chronicle in 1965.

The ruling completed the first phase of a suit brought by two weekly newspapers in the Bay area and four employment agencies.

The second phase will determine if the Chronicle and Examiner engaged in "predatory practices" forbidden by the NPA. It is uncertain whether the weeklies

will appeal the decision from the first phase or even continue into the second phase.[53]

If the trial proceeds into phase two, it will be the first time a joint operating agreement with antitrust exemption under the NPA will be tested for unfair, monopolistic activities that are not protected under the NPA.

Notes

[1]Rosen, Leslie Brooks, "Media Cross-Ownership, Effective Enforcement of the Antitrust Laws," Federal Communication Law Journal (Winter, 1980), p. 105.

[2]Ibid., p. 107.

[3]Ibid., p. 109.

[4]Ibid., p. 111.

[5]Gillmor, Donald M., Jerone A. Barron, "Citizen Publishing Company v. United States" (393 U.S. 131, 1969), Mass Communication Law (St. Paul: West Publishing Company, 1974), p. 664.

[6]Nelson, Harold L., Dwight Teeter, Jr., Law of Mass Communication (Mineola, New York: The Foundation Press, 1978), p. 592.

[7]Gillmor, p. 659.

[8]Ibid.

[9]Nelson, p. 592.

[10]Gillmor, p. 659.

[11]Nelson, p. 597.

[12]Ibid., (Newspaper Preservation Act, 15 U.S.C.A., Sections 1801-1804), p. 597.

[13]"Newspaper Guild v. Levi," 1 Med. L. Rptr. 2709-2719.

[14]Ibid., p. 2710.

[15]Ibid., p. 2719.

[16]Nelson, p. 602.

[17]Gillmor, p. 666.

[18]Ibid., p. 667.

[19]Nelson, p. 603.

[20]"Honolulu v. Hawaii Newspaper Agency," 5 Med. L. Rptr. 2394.

[21]Ibid., p. 2397.

[22]Ibid.

[23]"Mistrial in S. F. Antitrust Case as Jurors Fail to Reach Verdict," Editor & Publisher (January 12, 1980), p. 9.

[24]Ibid.

[25]Ibid.

[26]Winsky, Joseph, "What's Black and White and Edgy?" Chicago Tribune (March 30, 1978), N5-1-1-P.

[27]Shenefield, John, "Ownership Concentration in Newspapers." ABA Journal (September, 1979), p. 1332.

[28]Ibid.

[29]Materials related to the 1979 Cincinnati Enquirer, Inc./E. W. Scripps Company case, pp. 13-20.

[30]Ibid.

[31]Conrad, Paul, Prepared testimony of the National Newspaper Association, U.S. House of Representatives Committee on the Judiciary, (The Newspaper Preservation Act, Washington: U.S. Government Printing Office, 1969).

[32]"Two Weekly Publishers Challenge Joint Pact," Editor & Publisher (November 24, 1979), p. 16.

[33]Loevinger, Lee, "Media Concentration: Myth and Reality," Antitrust Bulletin (Fall, 1979), pp. 479-498.

[34]Ibid., p. 402

[35]Ibid.

[36]Ardgin, Birthney, "A Comparison of Newspapers Under Joint Printing Contracts," Journalism Quarterly (Winter, 1975), p. 347.

[37]Schweitzer, John C., Elain Goodman, "Does Newspaper Competition Make a Definite Difference to Readers?" Journalism Quarterly (Winter, 1975), p. 710.

[38]Shenefield, p. 1332.

[39]Ibid.

[40]Wiedrich, Bob, "Governments Need Clear Voice," Chicago Tribune (September 17, 1980), 4-4-1-C, Quote from Making It Perfectly Clear (Doubleday and Co., Inc., 1980).

[41]"Joint Operation Backed for 2 Cincinnati Dailies," Editor & Publisher (December 1, 1979), p. 11.

[42]Behr, Peter, "Wanted: Rich Flashy Homebody Seeks Classy, Clever Mate," Washington Post (August 10, 1980), G-11.

[43]Ibid.

[44]Ibid.

[45]"Chattanooga Dailies Start Joint Printing Operation," Editor & Publisher (May 17, 1980), pp. 13, 42.

[46] Ibid.

[47] Behr.

[48] Ibid.

[49] Ibid.

[50] Flynn, John J., "Legislation -- Antitrust and the Newspapers," Vanderbilt Law Review (December, 1968), P. 616.

[51] Gillmor, p. 663.

[52] "Joint pack ok'd in Chattanooga," Editor & Publisher (November 15, 1980), p. 50.

[53] "U.S. jury okays joining of 2 San Francisco dailies," Editor & Publisher June 20, 1981), p. 13.

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